NO. 09-376

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERICK ROSEMEYER ROSEMEYER,
SUPT.; AND TOM CORBETT, ESQ.
ATTORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA,

Petitioners,

vs.

EDWARD V. HUMMEL,

Respondent.

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI

H. DAVID ROTHMAN
ATTORNEY AT LAW
PA. ID#10997
5825 5TH AVENUE
SUITE 104A
PITTSBURGH, PA 15232
(412) 362-3838
FAX: (412) 338-9993

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The decision by the United States Court of Appeals For the Third Circuit is published, Hummel v. Rosemeyer, 564 F. 3d 290 (3rd Cir. April 29, 2009). The facts recited and the conclusions reached are manifestly correct, and review by This Honorable Court is not required. No new statement of the law is involved, Siehl v. Grace, 561 F. 3d 189 (3d Cir. 2009), Hummel ibid. page 304, fn. 4).

Petitioners do not properly apply Strickland v. Washington, 466 U. S. 668, 685, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984), pages 8-26 of the instant petition, all captioned as "Reasons for Granting the Writ"—

The Third Circuit succintly and properly applied Strickland, supra, published opinion, pages 304-305:

> The issue before us is not whether we must defer to the state court's determination that Hummel was competent but whether Bell was ineffective in his omissions and actions that led to the state court's determination that Hummel was competent and, if so, whether Hummel was prejudiced as a result. As our prior discussion demonstrates, Bell was so clearly ineffective that the state court's finding to the contrary is not entitled to deference because it was an unreasonable appliction of Strickland. Williams, 529 U. S. at 409-13, 120 S. Ct. 1495. We also conclude, though for a different reason, that we are not bound to accept the state court's finding that Hummel was not prejudiced...
>
> In light of the Court's failure to use the Supreme Court standard, i.e., "reasonable probability," and its use of the more stringent requirement of "show" the Superior Court's holding that Bell's actions did not prejudice Hummel is not entitled to deference it was contrary to clearly established United States Supreme Court law. We conclude, for the reasons set forth above, (1) that Hummel's counsel was ineffective for failing to deal appropriately with the likelihood that Hummel was incompetent to stand trial and (2) that there was a"reasonable probability" that Hummel was prejudiced by this ineffectiveness. Williams, 529 U. S. at 406, 120 S. Ct. 1495. It follows that the District Court erred in denying Hummel's request for a writ of habeas corpus.

REVIEW OF PETITIONERS' STATEMENT OF THE CASE

Neither psychologist who examined respondent was a "doctor," page 4 of the petition---that is not a medical doctor, a psychiatrist, as required by Pennsylvania's Mental Health Procedures Act, see published opinion by the Third Circuit, at pages 295-296. On direct appeal to the Superior Court, without laying any foundation at trial to support incompetency, the Superior Court rejected trial counsel's position (page 7 of the petition). The Third Circuit relied heavily on the testimony of Dr. Robert Wettstein, a Board Certified Forensic Psychiatrist, presented on respondent's behalf, at the PCR hearing before the trial judge in approximately three years after the homicide conviction, opinion by the Third Circuit, pages 303-304, published.

Petitioners never once observed the requirement of the Mental Health Procedures Act that respondent had to be examined by at least one psychiatrist before trial. This omission must be construed as deliberate, in the total context of the facts and circumstances of this badly botched performance by Bell, who at the time of trial, was the Public Defender.

PETITIONERS' ARGUMENT THAT DEFENSE COUNSEL ACTED REASONABLY IS OUTRAGEOUS

At page 13 of their petition, petitioners argue the Third Circuit has engaged in "Monday morning quarterbacking", and has substituted the court's judgment for that of the state court. Again, petitioners fail to understand the Third Circuit's statement of the issues, above, and the correct application of Strickland. Petitioners continue to characterize both psychologists as "doctors" who opined that respondent was legally competent to stand trial (page 14 of the petition).

The Circuit court viewed both reports by the psychologists as follows (564 F. 3d page 302):

> Of course, we cannot hold with any reasonable certainty that the trial court would have held a competency hearing. But it was Bell's stipulation to Hummel's competency that removed from the trial judge the necessity of making any such decision. Given the ambivalence of the two psychologists, and the fact that Hummel had put a bullet through his brain, it is certainly probable that the trial court would have directed an intensive inquiry into Bell's mental stage had Bell advised the trial judge of Hummel's parents concerns and of Bell's failure to have any meaningful interaction with his own client. Earlier at page 300, the court opined that "Both psychologists hedged on the dispositive question whether Hummel could assist Bell. Both reported that Hummel had no recollection of the shooting incident..." (Emphasis added).

At the conclusion of page 21 of the petition, petitioners continue to urge trial counsel's reasonable efforts on behalf of his client because of"the pre-trial expert medical reports..." again referring to the reports of the two psychologists.

Judge Brosky, dissenting in the Superior Court, aptly described trial counsel's ineffective approach on behalf of his client (at page 67 of petitioners' appendix, No. 1169 WDA 1999 and at page 76:

> Attorney Bell had a duty to inform himself fully of the facts and the law relative to Appellant's competence. However by his own testimony, he has demonstrated his lack of understanding as to the law regarding competence determinations.
>
> It appears that Attorney Bell believed that the appellant's competence or incompetence

> should be an issue of jury determination. Attorney Bell's argument that he did not want Appellant to testify for fear of ruining the position that Appellant was not competent is inexplicable. Incompetence is not a defense to first-degree murder or voluntary manslaughter. It is a fundamental question not to be determined prior to trial. (First emphasis is by respondent).

Attorney Bell did nothing material to further the issue of respondent's incompetence, and recklessly allowed the case of an incompetent defendant to proceed to a verdict of guilty of murder in the first degree with a life sentence. How could any reasonable judge or lawyer view Bell's performance as reasonable? His total performance was outrageously detrimental to his client's best interests.

PETITIONERS' ARGUMENT THAT HUMMEL CANNOT SHOW PREJUDICE IS FLAWED

"Bell's failure to attempt to invoke the Pennsylvania procedures designed for the situation when a defendant's competency is questionable is a further basis for finding Bell was ineffective," (564 F. 3d, page 302). The Circuit court then proceeds to discuss the Mental Health Procedures Act, and Judge Brosky's dissenting opinion on the same issue. The Circuit Court concludes with the subject at page 303:

> We need not decide whether the trial court was required to direct a psychiatric examination. The issue before us is not the trial court's decisions but whether Bell's actions---or inactions----show his ineffectiveness. The focus on the ineffectiveness claim is that Bell never even asked that a psychiatrist be appointed. We see no persuasive explanation for his failing to have done so.

The Third Circuit reviewed the reports of both psychologists in detail(564 F. 3d 298-300) and concluded that neither one would lead a reasonable attorney to stipulate to competency (at page 300). The court also concluded Bell's own testimony belied his conclusion that respondent knew what was going on (301-302) all of which supported Dr. Wettstein's testimony and the conclusion that respondent could not communicate with his attorney and establish provocation by his wife, significant prejudice, as well as defense counsel's inability to communicate with his client. During the District Attorney's closing argument, respondent blurted out "whose going to tell about the blow jobs?" (page 301).

The night before the end of the trial, respondent revealed to his mother, his wife came home and told him she performed oral sex on other men and came home and kissed him, right before the shooting. Mrs. Hummel told Bell this the next morning and Bell falsely told her the judge would not permit any more testimony about the victim's affairs.

CONCLUSION

The Petition for Writ of Certiorari does not entitle review by This Honorable Court. The Circuit Court's opinion and judgment are perfect. Wherefore Respondent moves that the Writ be denied.

Respectfully submitted,

H. DAVID ROTHMAN
ATTORNEY AT LAW
PA. ID#10997
5825 5TH AVENUE
SUITE 104A
PITTSBURGH, PA 15232
(412) 362-3838
FAX: (412) 338-9993